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# Property: Conflicting Constructive and Civil Possessions

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## PROPERTY: CONFLICTING CONSTRUCTIVE AND CIVIL POSSESSIONS<sup>1</sup>

The Louisiana Civil Code articles concerning possession and acquisitive prescription of immovable property were revised by Act 187 of 1982, effective January 1, 1983; but this revision did not change the basic concepts of constructive or civil possession. Possession of part of an immovable by virtue of a title is still deemed to be constructive possession to the limits of that title,<sup>2</sup> while civil possession still allows possession to be retained by the intent to possess as an owner even if the possessor has ceased corporeal possession.<sup>3</sup> The revision also followed the old law in another, less desirable, manner. Neither the old law nor the revision provides rules governing conflicts between constructive and civil possessions.<sup>4</sup> These conflicts arise in three basic instances: when two constructive possessions overlap the same tract of land, when a constructive possession overlaps a civil possession, and when two civil possessions overlap.

Each of these three conflicts can be illustrated by reference to diagram 1:<sup>5</sup> In the first example, X and Y acquire title and enter into simultaneous possession of tracts 1 and 2. X has title to tract 1 and enters into corporeal possession in the Northwest quarter. This corporeal possession of part of tract 1 gives X constructive possession of all of tract 1. Y has title to tract 2, and he enters into corporeal possession in the Southeast quarter. Y's corporeal possession of part of tract 2 gives him constructive possession of all of tract 2. The result is that there are conflicting constructive possessions in the shaded portion of the diagram. This example also applies to conflicts involving civil possessions. Under the same facts, suppose X ceases corporeal possession

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1. In the whole range of legal theory there is no conception more difficult than that of possession. The Roman lawyers brought their usual acumen to the analysis of it, and since their day the problem has formed the subject of a voluminous literature, while it still continues to tax the ingenuity of jurists. Nor is the question one of mere curiosity or scientific interest, for its practical importance is not less than its difficulty.

J. Salmond, *Jurisprudence* 293 (C. Manning 8th ed. 1930).

2. La. Civ. Code art. 3426; A. Yiannopoulos, *Property* § 212, at 556, in 2 *Louisiana Civil Law Treatise* (2d ed. 1980).

3. La. Civ. Code art. 3431; 1 M. Planiol, *Civil Law Treatise* pt. 2, no. 2267, at 342 (12th ed. La. St. L. Inst. trans. 1939).

4. See Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 *La. L. Rev.* 69, 76, n.26 (1983).

5. See page 988 [hereinafter referred to as diagram 1].

on tract 1 without intending to abandon ownership of the property. X's remaining civil possession conflicts with Y's constructive possession. In the final situation, if Y then ceases corporeal possession after X has ceased corporeal possession, the shaded area will represent conflicting civil possessions.

These conflicts are important in the context of both the possessory and petitory actions. A possessory action is a contest of the right to possess the land,<sup>6</sup> while a petitory action involves an adjudication of the ownership of land.<sup>7</sup> Normally a conflict between two parties as to possession and ownership of land will begin as a possessory action, which is less complex than a petitory action.<sup>8</sup> The winner of the possessory action is entitled to possession of the land. One important aspect of possession is that it gives the possessor the benefit of the rebuttable presumption that he is the owner of the land.<sup>9</sup> This presumption will become irrebuttable if the possessor retains possession long enough to perfect a claim of 10 or 30 year acquisitive prescription. The loser of the possessory action may attempt to prevent this by instituting a petitory action. At this point the presumption of ownership provides strong protection to the possessor. The non-possessing party has the burden of proving his ownership which involves the often impossible task of proving that he (the non-possessor) acquired ownership from a previous owner or by acquisitive prescription.<sup>10</sup> Proving that the land was acquired

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6. La. Code Civ. P. arts. 3655-3662; A. Yiannopoulos, *supra* note 2, §§ 203-221, at 544-92.

7. La. Code Civ. P. arts. 3651-3654; A. Yiannopoulos, *supra* note 2, §§ 185-201, at 497-541.

8. For example, the petitory action imposes a stronger burden of proof than the possessory action. The actions also differ in regard to prerequisites and available relief. See *infra* note 10.

9. "One is presumed to intend to possess as owner unless he began to possess in the name of and for another." La. Civ. Code art. 3427. This article replaced OA 3488 which stated, "As to the fact itself of possession, a person is presumed to have possessed as master and owner, unless it appears that the possession began in the name of and for another." NA 3427 did not change the law.

10. Code of Civil Procedure article 3653 states:

To obtain a judgment recognizing his ownership of immovable property or real right therein, the plaintiff in a petitory action shall: (1) Prove that he has acquired ownership from a previous owner or by acquisitive prescription, if the court finds that the defendant is in possession thereof; or (2) Prove a better title thereto than the defendant, if the court finds that the latter is not in possession thereof. When the title of the parties are traced to a common author, he is presumed to be the previous owner.

Thus, the presumption of ownership given to the defendant who is in possession keeps that defendant's title from being at issue until after the plaintiff has proven valid title in himself or has proven acquisitive prescription. *Schutten v. Orleans Parish Levee Dist.*, 320 So. 2d 605 (La. App. 4th Cir. 1975), cert. denied, 323 So. 2d 806 (La. 1976), *Garrett v. Ernest*, 369 So. 2d 713 (La. App. 1st Cir.), cert. denied, 371 So. 2d 1340 (La. 1979).

from a previous owner is difficult because it requires proving an unbroken chain of owners back to the sovereign or an ancestor in title in common with the possessor.<sup>11</sup> Proving acquisitive prescription predating the possessor's possession presents the problem of finding ancient evidence. In either event, the possessor enjoys a significant advantage over the non-possessor. Resolving the problems of conflicting constructive or civil possessions or both can thus be seen as a determination of which party is to receive possession and the accompanying, important presumption of ownership. This in turn may lead to a judicial determination of which party is the actual owner of the land.

The Louisiana Civil Code does not indicate which party is entitled to possession or ownership in any of these situations, but the Louisiana courts have addressed these problems on many occasions.<sup>12</sup> The Louisiana jurisprudence on these conflicts is consistent, but the guidance offered by the cases will not be equitable in all cases. This comment will examine the state of the existing jurisprudence and recommend an analytical framework for consistent and equitable future decisions.

### *The Underlying Property Theories*

In order to analyze the problems resulting from conflicts involving constructive or civil possessions or both, an understanding of the underlying property theories is essential. The problems can be viewed as the result of three interrelated concepts: (1) the requirement of notice to create possession and begin acquisitive prescription, (2) the theory of constructive possession whereby possession of part of a tract of land under title equals possession of the whole tract, and (3) the theory of civil possession or possession retained by intent.

### *Notice of Possession*

A possessor is entitled to the rebuttable presumption that he is the owner of the land.<sup>13</sup> This presumption benefits the possessor in two ways, especially if he is not the true owner of the land. First, if he

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11. This is because proving acquisition from a "previous owner" involves proving that the "previous owner" was indeed an owner. Cf. *Avery v. Nash*, 448 So. 2d 841 (La. App. 2d Cir. 1984); *Whitley v. Texaco*, 434 So. 2d 96 (La. App. 5th Cir.), cert. denied, 435 So. 2d 445 (1983); *Romby v. Zion Hill Baptist Church*, 327 So. 2d 538 (La. App. 2d Cir. 1976).

12. See cases cited *infra* note 43.

13. Civil Code article 3423 states, "A possessor is considered provisionally as owner of the thing he possess until the right of the true owner is established." Civil Code article 3427 states, "One is presumed to intend to possess as owner unless he began to possess in the name of and for another."

retains possession for one year he obtains the right to possess the land.<sup>14</sup> As a result, his possession can only be judicially contested in a petitory action, and (as previously discussed) the presumption of ownership gives the possessor strong evidentiary advantages in this action.<sup>15</sup> Secondly, if the possessor retains possession for the statutory period necessary to perfect a claim of acquisitive prescription, the presumption of ownership will become irrebuttable.<sup>16</sup> In either instance, the possessor is taking valuable rights from the true owner. The true owner loses these rights by failing to exercise timely his ownership by ousting the adverse possessor. An owner who fails to exercise these rights for the statutory period is presumed to have acquiesced to the adverse possessor's ownership.<sup>17</sup> But the true owner cannot be presumed to have acquiesced to an adverse claim when he has no knowledge of that claim.<sup>18</sup> Public policy will not allow an adverse possessor to surreptitiously take land from the true owner without giving the owner fair notice that his rights are being contested.<sup>19</sup> The law presumes that landowners maintain diligent

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14. La. Civ. Code art. 3422; *Pitre v. Tenneco Oil Co.*, 385 So. 2d 840 (La. App. 1st Cir.), cert. denied, 392 So. 2d 678 (La. 1980).

15. See *supra* note 10 and accompanying text. These evidentiary advantages may be insurmountable in many instances. Failure to meet these difficult evidentiary requirements would, in essence, allow the possessor to perfect his claim of acquisitive prescription without judicial challenge from the plaintiff.

16. La. Civ. Code art. 3446.

17. *Pitre v. Tenneco Oil Co.*, 385 So. 2d at 846.

18. In the same way that prescription *liberandi causa* is founded upon a presumption of payment, prescription *acquirendi causa* is founded upon a presumption of acquiescence on the part of the owner in the claim of title set up by the possessor; and the owner of property cannot be presumed to have acquiesced in a claim of ownership of which he is in total ignorance.

*John T. Moore Planting Co. v. Morgan's La. & T. R. & S.S. Co.*, 126 La. 839, 879, 53 So. 22, 35 (1908); 28 G. Baudry-Lacantinerie & A. Tissier, *Traite Theorique et Pratique de Droit Civil* § 257, at 138 (4th ed. 1924), in 5 *Civil Law Translations* (J. Mayda trans. 1972); *Pitre v. Tenneco Oil Co.*, 385 So. 2d 840 (La. App. 1st Cir.), cert. denied, 392 So. 2d 678 (La. 1980). This presumption of acquiescence is a fiction. An alternative method of stating this same concept is that an owner who has failed to exercise ownership or surveillance rights for 10 or 30 years has been so negligent in developing his property that it seems equitable to transfer ownership of that property to a possessor who has developed it during that long period. Although both the acquiescence and negligence theories can be used to justify the concept of acquisitive prescription, a more likely justification may be the desire to bar ancient claims. In this respect, the possessor is protected from claims to his land which he would have difficulty in defending because of the problems of locating evidence over 10 or 30 years old.

19. La. Civ. Code arts. 3435-3436; Comment, *Elementary Considerations in the Commencement of Prescription on Immovable Property*, 12 Tul. L. Rev. 608, 611 n.14 (1938). "The [notice] requirement rests on the policy judgment that existing rights in land should not be lost without the owner's being put on guard sufficiently to enable him to take preventative action by acting with reasonable promptness." 7 R. Powell, *The Law*

surveillance of their land. Therefore, in order to obtain the benefits of the presumption of ownership or acquisitive prescription, the adverse possessor must prove that he has exercised acts of ownership on the land that would be sufficient to put a reasonably prudent landowner on notice of an adverse claim.<sup>20</sup>

### *The Theory of Constructive Possession*

A landowner who corporeally possesses part of an immovable under a title is deemed to have constructive possession to the limits of his title;<sup>21</sup> thus, constructive possession can be viewed as a legal fiction. The actual possession of the landowner is extended by creation of law to the limits of his paper title.<sup>22</sup>

A paradox is involved in this legal fiction. In conjunction with corporeal possession of part of a tract of land, a title must be used to define the limits of the constructive possession. A recorded title represents a disturbance in law;<sup>23</sup> yet, a disturbance in law does not give notice of the titled claim.<sup>24</sup> Thus, while the recorded title can be used to prove

of Real Property § 1013[2][b] (1982). Cf. *Gerhard v. Stephens*, 68 Cal. 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968) (requirement of notice from surface estate owner claiming possession of severed mineral estate to owner of the mineral estate.)

20. 28 G. Baudry-Lacantinerie & A. Tissier, *supra* note 18, §§ 258 & 260, at 139;

When a possessor is actually in possession of the disputed property, the requirement of notoriety is normally met, whether or not the owner actually knows of the possession. When he does not in fact know of the possession, the actuality of the possession is commonly treated as "notice", satisfying the requirement.

What a duly alert owner would have known, the owner is charged with knowing.

7 R. Powell, *supra* note 19, § 1013[2][b], at 91-14; "Actual knowledge of the possession on the part of the true owner is not, however, necessary, it being sufficient that he could have learned thereof by the exercise of proper diligence." 4 H. Tiffany, *The Law of Real Property* § 1140, at 727 (3d ed. 1975). Tiffany also suggests that there is an exception to this general rule;

"There are, however, statements to be found that notoriety of possession is not necessary in case the possession is actually known to the rightful owner, statements which suggest, by implication, that there might be a possession sufficient to satisfy the requirement of actual possession, but not sufficient to satisfy that of visible and notorious possession."

*Id.* at 728.

21. La. Civ. Code art. 3426; A. Yiannopoulos, *supra* note 2, § 212, at 566; *Donegan's Heirs v. Martineau*, 9 Mart. (o.s.) 43 (La. 1820); 7 G. Powell, *supra* note 19, § 1013[2][g], at 91-39.

22. A contrario, in the absence of title one has possession only of the area he actually possesses. La. Civ. Code arts. 3426 & 3487.

23. La. Code Civ. P. art 3659; A. Yiannopoulos, *supra* note 2, § 216, at 581.

24. A man who is in the quiet and peaceable possession and enjoyment of his property does not have to be inspecting the public records every day, or every month or every year, or, for the matter of that every 10 or 30 years, to find out if somebody has not been recording title to his property. Until his possession is disturbed he does not have to concern himself with any claims that other

the extent of the land claimed, that title alone is inadequate to give notice that an adverse claim is being actively asserted. The significance of this paradox is that the legal fiction of constructive possession does not give notice sufficient to begin possession or acquisitive prescription.

### *The Theory of Civil Possession*

Two things are necessary to acquire possession: corporeal detention of the thing (*corpus*) and the intent to possess as owner (*animus*).<sup>25</sup> Once acquired, possession is retained by mere *animus*, even if the possessor ceases to possess corporeally. This is the concept of civil possession.<sup>26</sup>

The policy justification underlying the concept of civil possession is that it promotes title stability by allowing persons to retain possession without requiring continuous acts of corporeal possession. This in turn makes the rights of ownership perpetual since even an absentee owner can continually assert his rights as against third parties.<sup>27</sup> This policy of title stability is evidenced by a change in the law in the 1982 revision of the Civil Code. Old article 3444 provided the rebuttable presumption that a possessor intended to retain civil possession after ceasing corporeal possession. This presumption had a maximum duration of ten years.<sup>28</sup>

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people may be recording against his property. Registry is for the benefit of those who wish to contract with reference to property—to inform them of the condition of the title to the property with reference to which they are about to contract, and was never designed to operate as a means of disturbing or ousting the possession of the owner of the property.

John T. Moore Planting Co. v. Morgan's La. & T. R. & S. S. Co., 126 La. 839, 879, 53 So. 2d, 35 (1908); Roy O. Martin Lumber Co. v. Lemoine, 381 So. 2d 915 (3d Cir. 1980).

25. La. Civ. Code art. 3424; 28 G. Baudry-Lacantinerie & A. Tissier, *supra* note 18, § 214, at 118; 1 M. Planiol, *supra* note 3, no. 2267, at 342; 2 C. Aubry & C. Rau, *Droit Civil Francais* § 179, at 85 (P. Esmein 7th ed. 1961), in 2 *Civil Law Translations* (J. Mayda trans. 1966).

26. La. Civ. Code art. 3431; 1 M. Planiol, *supra* note 3, no. 2274, at 346; 28 G. Baudry-Lacantinerie & A. Tissier, *supra* note 18, § 228, at 124; A. Yiannopoulos, *supra* note 2, § 211, at 564; Ellis v. Prevost, 19 La. 251 (1841).

27. Note, Working With the New Civil Code Property Scheme: The 1982 Book III Revision, 43 La. L. Rev. 1079 (1983). Cf. Comment, The Ten-Year Acquisitive Prescription of Immovables, 36 La. L. Rev. 1000 (1976) (arguing that stability of title is a purpose underlying concept of acquisitive prescription).

28. Old article 3444 stated:

To retain the possession of a thing when a man once has it, it is not even necessary that he should have such positive intention; a negative intention suffices, that is, it suffices that the positive intention, which he had in acquiring the possession, shall not have been revoked by a contrary intention; for, so long as this revocation does not take place, the possessor is supposed always to retain his first intention, unless a third person has usurped or taken from him possession, or he has failed to exercise an actual possession for ten years.

The revision eliminated this limitation<sup>29</sup> and now civil possession can continue indefinitely. This change in the law will have two relevant effects: first, it can be said that all land in Louisiana that has ever been corporeally possessed is now at least civilly possessed;<sup>30</sup> second, possession can no longer be lost by non-use.<sup>31</sup>

### *Loss of Possession*<sup>32</sup>

With the repeal of the ten year limitation on civil possession, losses of constructive, civil, and corporeal possession are now all handled by article 3433 which states that possession can be lost by abandonment, or by eviction by force or usurpation.<sup>33</sup> Whether an eviction by force or usurpation has occurred is a question of fact which depends upon the circumstances of each case.<sup>34</sup> Declaring that an issue is a question of fact gives minimal guidance in a determination of what constitutes loss of possession, and thus article 3433 is no more than a starting point. Since article 3433 is now the only article covering loss of constructive, civil, and corporeal possessions, it can be argued that the same standard of ouster is applicable to each type of possession. This view has been criticized as overly simplistic.<sup>35</sup> Arguments have been advanced in favor of the application of two different factual standards

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29. Old article 3444 was replaced by article 3432 which states, "The intent to retain possession is presumed unless there is clear proof of a contrary intention." While the elimination of the ten year limit on civil possession is technically a change in the law, the effect of this change is minimized by the fact that the Louisiana courts had not strictly applied OA 3444. See Note, *supra* note 27, at 1087 and Symeonides, *supra* note 4, at 79 n.30.

30. See Symeonides, *supra* note 4, at 79 n.30.

31. La. Civ. Code art. 3432, comment (c). See also Symeonides, *supra* note 4, at 79 n.30.

32. Except in the case of abandonment, any discussion of how one party loses possession is necessarily a discussion of how another party has gained possession. Thus, a discussion of what level of disturbance will cause a person to lose a certain type of possession is implicitly a discussion of what level of acts an adverse claimant must maintain to oust that type of possession.

33. "Possession is lost when the possessor manifests his intention to abandon it or when he is evicted by another by force or usurpation." La. Civ. Code art. 3433; Note, *supra* note 27, at 1088. A possible exception to the statement that article 3433 governs all losses of possession may be found in article 3432. This article allows civil possession to be lost by proof of an intent contrary to the intent to possess as owner under article 3431. But this can best be described as a particularized form of abandonment which eliminates it as an exception to the statement that article 3433 governs loss of all possessions. See also the comments following article 3433.

34. La. Civ. Code art. 3433, comment (d); *Liner v. Louisiana Land & Exploration Co.*, 319 So. 2d 766 (La. 1975); 4 H. Tiffany, *supra* note 20, § 1143, at 755.

35. Symeonides, *Developments in the Law, 1982-1983—Property*, 44 La. L. Rev. 505, 513 (1983).



under article 3433: one governing loss of constructive possession and the other governing loss of corporeal possession.<sup>36</sup> This distinction would require the application of a higher factual standard to determine whether corporeal possession has been lost than would be required in a similar determination regarding loss of constructive possession, *i.e.*, it will take more to defeat a corporeal possession than to defeat a constructive possession. This is a sound distinction, but the matter may be complicated by the inclusion of civil possession in this dual standard.

In ascertaining how civil possession fits under this bifurcated article 3433 standard, a logical distinction can be drawn between corporeal possession and both civil and constructive possession. Corporeal possession involves both *corpus* and *animus*<sup>37</sup> because the possessor is physically on the land with the intent to possess as the owner. In this case the *corpus* evidences the corporeal possessor's *animus*. The possessor's intent to possess can be ascertained by looking at the land. In contrast to this physical reality involved in the notion of corporeal possession, the concepts of civil possession and constructive possession can both be viewed as legal fictions based upon the *animus*. With constructive possession, a title describes the geographical extent of the land which the owner intends to possess, and his possession is extended by the title to the limits of that *animus*. With civil possession no physical requirements exist since *animus* alone is sufficient to retain possession. Thus, unlike corporeal possession, neither constructive nor civil possession is evidenced by physical activity on the land.

On the basis of this distinction, civil possession and constructive possession should fit together under the dual standard of article 3433. A third standard under article 3433 is unnecessary because of the similarly intangible nature of both civil and constructive possessions.<sup>38</sup> The result

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36. *Id.*

37. 2 C. Aubry & C. Rau, *supra* note 25, § 179, at 85; 1 M. Planiol, *supra* note 3, no. 2267, at 342.

38. Besides not being necessary, it may not be desirable to have a different factual standard as between ouster of civil and constructive possessions. A simple example will demonstrate the problems involved in such a distinction. In diagram 1, assume that X has title to tract 1 and is in corporeal possession in the Northwest Quarter. His corporeal possession of part of the land gives him constructive possession of the entire tract. Y has title to tract 2 and is in corporeal possession in the Southeast Quarter. Y's corporeal possession on part of the land gives him constructive possession of all of tract 2. The result is conflicting constructive possession in the shaded area. Now assume the largest possible difference in factual standards between ouster of civil and constructive possession; constructive possession can oust civil possession. X now ceases corporeal possession of tract 1, but retains civil possession. Y's current constructive possession instantly ousts X's civil possession as to the shaded area. Without any notice to X, Y has taken a portion of land under X's title. Any other difference in factual standard between ouster of civil

is a factual standard for ascertaining loss of corporeal possession and a reduced factual standard for ascertaining loss of both constructive and civil possession.

### *The Conflicts*

Although the three underlying theories discussed above are adequately set forth in the Civil Code, the Code does not provide an equally sufficient explanation of how the theories interact. This shortcoming is often illuminated in cases involving disputes between parties claiming the same tract of land. In these cases, each party believes he owns the disputed tract, and this belief may exist for a great many years before the conflict is even discovered. The reason these conflicts can go undiscovered for long periods explains precisely why the problems arise in the first place. Essentially, the problem is caused by the intangible nature of both constructive and civil possession.

As previously discussed, corporeal possession involves both *corpus* and *animus*.<sup>39</sup> The *corpus* (or physical aspect) makes corporeal possession obvious and notorious. For example, lights on in houses, cars in driveways, and fences around inhabited lots generally indicate an obvious possession. These corporeal aspects of the possession make it identifiable, thus giving notice of its existence. In contrast, civil and constructive possession rarely give notice to the world of their existence. These legal fictions are not evidenced on the land itself—in fact, their purpose is to avoid a requirement that possession of land be at all times corporeal in nature.

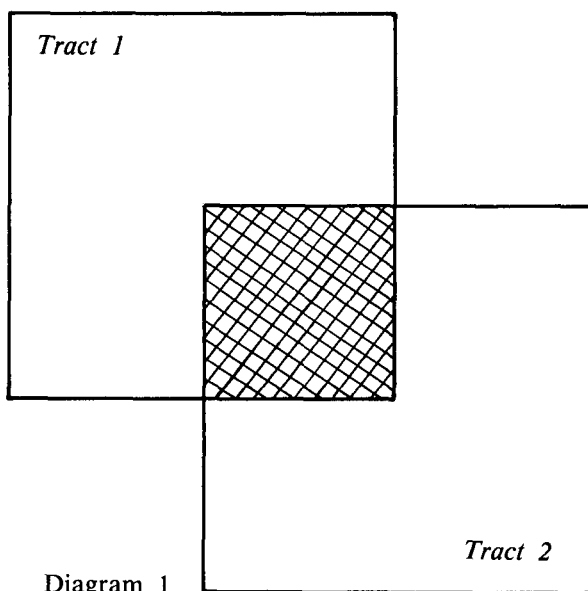
The significance of this failure of both constructive and civil possessions to give notice can be illustrated by the situation represented in diagram 1. Assume that X acquires title to tract 1 and enters into corporeal possession in the Northwest quarter, thus giving X constructive possession of all of tract 1. Y acquires title to tract 2 and enters into corporeal possession in the Southeast quarter, thus giving Y constructive possession of all of tract 2. The shaded area represents conflicting constructive possessions,<sup>40</sup> but the conflict is not discovered for fifteen years at which time one of the parties brings a petitory or possessory action. Assuming that X acquired possession first, X will claim that Y

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and constructive possessions will allow the same result: parties will be able to oust prior possessions without any notice. Such a loss of possession without any notice should be prevented.

39. See *supra* note 37.

40. Note that since the same standard of ouster or loss of possession is applicable to both constructive and civil possessions under article 3433 the two types of possession are effectively interchangeable at this point in the hypothetical. The shaded area can represent conflicting constructive possessions, conflicting civil possessions, or both.



never gave him notice of Y's adverse claim to the shaded area and that X has acquired the tract by acquisitive prescription. It seems unfair to allow Y to acquire land previously constructively possessed by X without notice to X.<sup>41</sup> But assume that Y is actually the owner of the land and that X acquired title from someone who did not own tract 1. In this instance, X is clandestinely taking land which rightfully belongs to Y. X's preexisting constructive possession is not ousted by Y's constructive possession. Although Y is the true owner of the land, his possession has been limited by X's prior possession even though Y had no notice of such a limitation on his possession.<sup>42</sup> Strong equitable arguments can be made in favor of each party, even in this simple example. Although equitable solutions are possible for conflicts involving similar fact patterns, a remaining problem is determining whether that judicial solution can be equitably applied to other cases as a guiding principle.

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41. The result is that Y cannot constructively possess the shaded area because this would be a dispossession of X without notice to X. However, Y is not completely deprived of the right to constructively possess land under his title. Y may constructively (or civilly) possess tract 2 in all areas not possessed by X. The limit on Y's constructive possession is merely a limitation on Y's ability to oust a prior possession by asserting his own constructive possession. See *infra* note 47 in regards to the problem of concurrent possession by two possessors.

42. While X may, in effect, be clandestinely limiting Y's possession, Y has given no notice to X of his second encroaching possession. X can equitably argue that he should be entitled to the benefit of the full extent of his constructive possession for purposes of acquisitive prescription absent notice of Y's claim.

*The Louisiana Jurisprudence*

The Louisiana courts have faced the above issues on many occasions.<sup>43</sup> An example of the consistent reasoning used by the courts in cases where they have squarely faced this issue is given by *Ernest Realty Co. v. Hunter Co.*<sup>44</sup> In this case, a common author deeded the same small tract of land (Lot 4) to two separate vendees under two deeds of larger tracts of land. The defendant was in corporeal possession of part of the land which gave him constructive possession of Lot 4 under the senior deed dated June 9, 1906. The plaintiff also had constructive possession of Lot 4 by virtue of corporeal possession of part of the land under the junior deed dated February 20, 1907. Neither party was in corporeal possession of any part of Lot 4.<sup>45</sup>

In resolving this conflicting constructive possession issue, the court began with a common presumption: there cannot be two possessions at the same time of the same property.<sup>46</sup> This case, like other cases that begin with this presumption, does not give any rationale for this presumption. The reasoning is apparently rooted in the desire to prevent potential uncertainty in land titles. If two parties were allowed to possess the same land at the same time, both would benefit from the presumption that they were the owner of the land. Accordingly, each possessor would be entitled to obtain the right to possess the land after one year and to eventually perfect a claim of acquisitive prescription. Allowing such concurrent possession could require the courts to decide which party is entitled to retain their concurrently perfected claim of either the right to possess or acquisitive prescription. Allowing one such perfected claim

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43. The long line of Louisiana jurisprudence on this issue is represented by the following cases: *Gilmore v. Schenck*, 115 La. 386, 39 So. 40 (1905); *John T. Moore Planting Co. v. Morgan's La. & T. R. & S.S. Co.*, 126 La. 839, 53 So. 22 (1908); *Chicago, St. L. & N.O. Ry. Co. v. Town of Amite City*, 136 La. 742, 67 So. 814 (1915); *Smith v. Arkansas Fuel Oil Co.*, 219 La. 982, 54 So. 2d 421 (1951); *Crain v. Graves*, 177 So. 2d 189 (La. App. 3d Cir. 1965); *Downs v. McNeal*, 193 So. 2d 843 (La. App. 3d Cir. 1967); *Gaulter v. Gennaro*, 345 So. 2d 92 (La. App. 1st Cir. 1977); *Whitley v. Texaco*, 434 So. 2d 96, 107 (La. App. 5th Cir. 1982). The consistency of this jurisprudence is illustrated by the fact that the holding in *Whitley v. Texaco* was based upon a quotation from *Gilmore v. Schenck*.

44. 189 La. 379, 179 So. 460 (1933).

45. One should note that the facts of this case are easily reducible to the parameters of the simple examples used previously.

46. It is a well settled and established principle of law that where the legal and rightful owner of a tract of land has actual possession of a part thereof, he is in legal and constructive possession of the whole, except such portion thereof that may be in the actual possession and occupancy, by inclosure or otherwise, of a party claiming either by title under article 3478 or thirty years' adverse possession, article 3499. The reason for this rule is that both cannot have constructive possession.

*Ernest Realty Co. v. Hunter Co.*, 189 La. 379, 384, 179 So. 460, 461 (1938).

to supersede another equally perfected claim would destroy the title stability benefits of both possession and acquisitive prescription. Therefore, in order to preserve title stability, the law prohibits concurrent possessions.<sup>47</sup> Once this prohibition is established as the starting point

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47. This prohibition on concurrent possession of the same land is needed to preserve logical consistency under the current framework of the Civil Code. The following example demonstrates this need. In diagram 1 assume X acquires tract 1 in 1979 under valid title, but that the title is defective in that the vendor did not really own tract 1. X enters into corporeal possession of the Northwest quarter, which gives him constructive possession of the entire tract. Y acquires tract 2 as a good faith possessor under just title in 1980, entitling Y to the potential benefits of ten year acquisitive prescription. Y's corporeal possession in the Southeast quarter of tract 2 gives him constructive possession of all of tract 2. The shaded area represents conflicting constructive possessions. Assume this conflict is not discovered until 1985 at which time Y wins a petitory action affirming his ownership of the shaded tract. The problem is that prior to the date of this judgment, X had been possessing the shaded area as the first possessor. Y's constructive possession of the shaded area was prevented by X's prior possession. Theoretically, Y has 5 years worth of possession towards acquisitive prescription of tract 2, except as to the shaded area where his possession did not begin until 1985. This difference in Y's length of possession could be significant if Y is called upon to defend his title in the years between 1990 and 1995 and Y must do so by proof of acquisitive prescription.

There are three possible solutions to this problem, but all three solutions will be logically inconsistent with existing law. The first solution, as previously discussed, is to allow concurrent possession. But this solution is logically flawed in that the conflicting claims may not be discovered until after both possessors have concurrently perfected claims to the land by acquisitive prescription. Allowing one party to defeat another party's perfected claim of acquisitive prescription with a concurrent claim of acquisitive prescription will destroy the title stability benefits of the prescription doctrine by destroying the ability to rely thereon.

An alternative solution is to grant Y retroactive possession of the shaded tract effective back to the day when Y first established constructive or civil possession of tract 2. But this would in essence allow Y's constructive possession to have ousted X's constructive possession. This sort of dispossession is not consistent with the fact that X could have acquired the tract by prescription if Y had not timely challenged his possession. Allowing Y to retroactively dispossess X only if X has not perfected a claim of acquisitive prescription to the tract may provide a solution to this inconsistency, but any use of retroactive possessions invites an undesired measure of complicity into the matter. For example, the companion issue of accession promises to be particularly difficult when dealt with retroactively.

A third solution was flirted with by the fifth circuit in *Whitley v. Texaco, Inc.*, 434 So. 2d 96 (La. App. 5th Cir. 1983). On original hearing the court stated that conflicting constructive possessions "offset" each other. Two possessions cancel each other out, depriving either party of the benefits of possession. Such an "offset" also allows the second possessor's constructive possession to oust the first possessor's constructive possession. On rehearing the court wisely abandoned this "offset" concept, and held that the first constructive possessor was entitled to retain his possession until ousted. The second possessor's constructive possession did not oust the first possession. Allowing the first possessor to retain possession until ousted is the most logically consistent result under the framework of the current Civil Code. See Symeonides, *supra* note 35, at 514.

of the court's rationale, the ultimate solution is practically inevitable. The first possessor becomes the sole possessor, unless he is ousted by the second possessor. The second possessor's constructive possession does not oust the first possession.<sup>48</sup> Once the first possessor acquires the right to possess, the second possessor must resort to a petitory action and challenge the first possessor with a claim of true title and ownership. In *Ernest Realty Co.* the defendant prevailed by virtue of his senior title from the common author, and this decision is typical of other such cases.<sup>49</sup>

### *Effects of These Decisions*

Although these decisions initially appear reasonable and just, the holdings may cause several undesirable effects. These effects in turn may result in inequities under different factual circumstances.

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48. The second possessor's constructive possession does not give notice of the second possessor's claim, and thus cannot oust the first possessor. See text accompanying notes 21-24.

49. Common law jurisdictions have reached the same result via the same reasoning. The following is a representative sample of the United States Supreme Court's handling of this matter:

It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title. Still, his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has constructive possession of all the land not in the actual possession of the intruder, and this, though the owner's actual possession is not within the limits of the defective title. "The reason is plain. Both parties cannot be siesed at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title." These distinctions are clearly shown in the cases. One who enters upon the land of another, though under color of title, gives no notice to that other of any claim, except to the extent of his actual occupancy. The true owner may not know the extent of the defective title asserted against him, and if while he is actual possession of part of the land, claiming title to the whole, mere constructive possession of another, of which he has no notice, can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretence. Such, we think, is not the law.

Hunnicutt v. Peyton, 102 U.S. 333, 368-69 (1880).

The first result apparent from the cases is that the courts perceive that equities generally favor the first possessor.<sup>50</sup> The first possessor can only be dispossessed by a timely challenge<sup>51</sup> from a person who successfully claims that he is the true owner of the land. Thus the first possessor receives the benefit of all three of the underlying theories previously discussed. He is entitled to benefit from the legal fictions of constructive and civil possession unless he receives adequate notice of an adverse claim.

The second possessor does not receive the benefit of these property theories. His constructive or civil possessions cannot exist as against a prior possessor, regardless of whether the second possessor has notice of such a restriction on his possession.<sup>52</sup> The prior possession prevents the second possessor from receiving these benefits, and the result is that the second possessor is limited to acquisitive prescription by inch-by-inch corporeal possession.<sup>53</sup>

In cases similar to *Ernest Realty Co.*, the holdings in favor of the first possessor are fair. When neither party is in corporeal possession of the tract in conflict, neither party has given notice to the other party of an adverse claim. It is consistent with the title stability policy underlying these problems to continue the first possessor's possession and claim of ownership to the land unless the challenger can prove that he is the true owner of the land. To hold otherwise would be to promote the clandestine taking of land by the second possessor, or by the first possessor in the case where he is not the true owner.

### *The Exception for Partial Corporeal Encroachment*

There are cases in which the general rules stated above will seemingly result in inequitable holdings. For example, assume X has title to the tract in diagram 2<sup>54</sup> and moves into corporeal possession of the house in the Southeast quarter. X's corporeal possession of the house in the fenced area gives him constructive possession of the entire tract. Now

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50. Cf. 5 G. Thompson, Commentaries on the Modern Law of Real Property § 2543 (1979).

51. A "timely" challenge is a challenge asserted before the adverse possessor acquires the right to possess, La. Civ. Code art. 3422, or acquires the land by 10 year acquisitive prescription, La. Civ. Code art. 3473, or 30 year acquisitive prescription, La. Civ. Code art. 3486.

52. See e.g., *Gilmore v. Schenck*, 115 La. 386, 39 So. 40 (1905); *Downs v. McNeal*, 193 So. 2d 843 (La. App. 3d Cir. 1967); 7 R. Powell, *The Law of Real Property* § 1013[2][g] (1982).

53. Thus his situation is analogous to the situation of a possessor without title under Civil Code article 3426: "In the absence of title, one has possession only of the area he actually possesses."; see 4 H. Tiffany, *The Law of Real Property* § 1155 (1975).

54. See page 993 [hereinafter referred to as diagram 2].

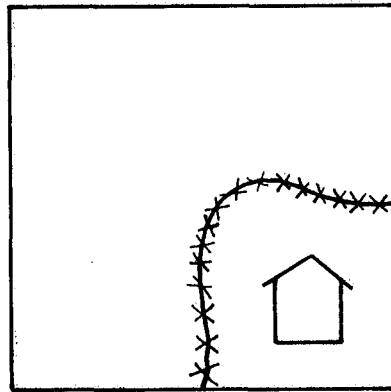


Diagram 2

assume X ceases corporeal possession by moving away, but retains civil possession of the entire tract. Y acquires title to the entire tract from a vendor other than X and moves into corporeal possession of the house. Y corporeally possesses within the fenced area and has ousted X as to that portion of the tract. But under the holdings of the above cases, Y would not benefit from the concept of constructive possession due to X's existing civil possession and, thus, Y is limited to inch-by-inch corporeal possession.<sup>55</sup> X retains possession, without notice to Y, of all land outside the fenced area.<sup>56</sup> The smaller the lot is, the more onerous the result becomes.

It seems unfair to limit Y's possession in such a manner, especially without notice to Y of the imposition of such a restriction. But there is a significant difference between this hypothetical situation and those discussed previously. Y's corporeal possession encroaches on a part of the disputed tract in such a manner that it may be said to have given notice of the adverse claim to X. This distinction should result in an exception to the rule formulated in the prior cases.

An analogy to the California Supreme Court case *Gerhard v. Stephens*<sup>57</sup> provides an explanation of this exception. In *Gerhard*, the conflict was between owners of a surface estate and owners of a mineral estate; the court applied California state law to resolve the issue. Although an analogy could be drawn between the California law and

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55. As to why Y's current constructive possession should generally not oust X's civil possession, see *supra* note 38. It will be argued below that this situation represents an exception to this general rule.

56. This example represents an extreme possibility. The same problem would exist in the prior examples if Y had fenced in a portion of the shaded conflicting constructive possession tract, as discussed *infra* text accompanying note 73.



Louisiana law,<sup>58</sup> the case is being used here primarily for its analytical organization and focus. The logical framework provided by the case emphasizes the significance of the notice requirement in resolving disputes between conflicting estates. This focus on notice, as shall be explained below, is the equitable foundation for the partial corporeal encroachment exception.

In *Gerhard*, the plaintiffs owned a severed mineral estate and sued to quiet title as against acts by the defendants who owned the surface estate. The defendants claimed, among other things, that they had acquired the mineral estate by adverse possession, both by surface activity and the drilling of a dry hole on an adjacent tract. In an opinion by Justice Tobriner, the California court held that the defendant surface owners could not claim adverse possession of the minerals without giving notice of such claim to the plaintiffs. This notice would have to be in the form of a well drilled into the plaintiff's mineral estate—a corporeal encroachment. "The California cases hold that a person in actual possession of only a part of the land to which he has color of title cannot establish ownership of the entire tract by adverse possession unless his *actual* possession infringes upon the presumptive possession of the true owners of the land."<sup>59</sup>

A comparison should be made between the two estates in *Gerhard* and the two estates in the preceding hypothetical examples. As discussed previously, in the *Ernest Realty Co.* situation the second possessor's constructive or civil possession of the disputed tract is ineffective as against the first possessor's constructive or civil possession. This is because the second possessor's intangible possession does not provide notice of his claim.<sup>60</sup> But as illustrated by the *Gerhard* analogy, a corporeal encroachment onto the disputed tract by the second possessor may give the necessary notice to enable the second possessor to perfect his claim. Recognition of this corporeal encroachment exception raises two additional issues: the sufficiency of notice supplied by this corporeal encroachment and the extent of the possession based on that encroachment.

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57. 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

58. The California civilian-based property law contains several similarities with Louisiana law. See generally 2 Cal. Jur. 3d Adverse Possession §§ 1-82 (1973); 51 Cal. Jur. 3d Property §§ 6-12 (1979). A more specific example is California Code of Civil Procedure section 322 which discusses the theory of constructive possession in the law of adverse possession.

59. *Gerhard v. Stephens*, 68 Cal. 2d 864, 902, 442 P.2d 692, 721, 69 Cal. Rptr. 612, 641 (1968).

60. See *supra* notes 47-51.

*Sufficiency of Notice From Partial Corporeal Encroachment*

As previously discussed, notice is required to begin the running of acquisitive prescription.<sup>61</sup> In the absence of notice, the adverse claim can be considered clandestine and, thus, will not be given effect.<sup>62</sup> Whether notice is sufficient to begin acquisitive prescription is a question of fact which depends on the circumstances of each particular case.<sup>63</sup> Although a study of the sufficiency of notice is beyond the scope of this paper,<sup>64</sup> the notice requirement is generally satisfied when the facts allow the raising of a presumption that a diligent landowner would have known of the adverse claim.<sup>65</sup> A prudent landowner should exercise his possession with sufficient diligence to prevent persons from taking his property by acquisitive prescription. A corporeal encroachment onto property will seemingly provide sufficient notice of an adverse claim in most cases.<sup>66</sup>

*Extent of the Possession*

Assuming sufficient notice, the next issue is a determination of the extent of the possession resulting from that notice. As acknowledged by the *Gerhard* case, the corporeal encroachment can be viewed in two ways.

First, under the view consistent with the cases discussed above,<sup>67</sup> the second possessor is not given the benefit of the legal fictions of either constructive or civil possessions due to the existence of a prior possession. The second possessor's possession is limited to that land which he possesses corporeally. To carry the *Gerhard* analogy one step further, this has been the rationale used in several cases involving conflicting claims between surface and mineral estates.<sup>68</sup> In these cases, subsurface activity by the surface owner did not give title by constructive possession to the entire mineral estate. This ruling can be justified in

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61. See *supra* text accompanying notes 17-20.

62. La. Civ. Code arts. 3435-3436.

63. See *supra* note 34.

64. For more detailed discussions of the factual sufficiency of notice, see Comment, Elementary Considerations in the Commencement of Prescription on Immovable Property, 12 Tul. L. Rev. 608 (1938); Comment, Notice as an Element of Adverse Possession, 7 Baylor L. Rev. 234 (1955).

65. See *supra* note 20.

66. "It cannot be held as a matter of law that the enclosure and cultivation of a field of one acre on a large tract of land is not sufficient possession and use to put the owner of the land on notice." 2 Tex. Jur. 3d, Adverse Possession § 182, at page 594.

67. See *supra* note 43.

68. E.g., *Sanford v. Alabama Power Co.*, 256 Ala. 280 (1951); *Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394 (Ky. Ct. App. 1934).

a case involving conflicting surface estate claims on the ground that a landowner may acquiesce in a slight encroachment, but by acquiescing to that minor encroachment he should not be held to have acquiesced to a greater constructive encroachment. Under this view the corporeal encroachment is not notice of any larger claim.<sup>69</sup>

This rule seems overly harsh to the second possessor. The first possessor has acquiesced in a corporeal encroachment, but has retained constructive or civil possession of the remainder of the disputed tract. The second possessor believes that his corporeal encroachment has supplied notice of his claim, and since he has no notice of the first possessor's existing constructive or civil possession, he has no incentive to further exert his claim. Between the parties, only the second possessor has overcome the primary deficiency of an encroaching civil or constructive possession because only the second possessor has given notice of any claim to the disputed tract. As such, the second possessor should receive the benefits of constructive and civil possession. Under the *Gerhard* analogy, several cases have held that "development of part of the subsurface estate under color of title to the entire tract will mature a prescriptive title to the entire mineral estate."<sup>70</sup> Under this rationale, an adverse corporeal encroachment by a second possessor onto the estate of the first possessor should result in a duty on the first possessor to investigate and ascertain the true extent of the adverse claim.<sup>71</sup>

Thus, when the second possessor has a corporeal possession which encroaches partially onto the land of another, the second possessor has given notice that he is making an adverse claim to the prior possessor's land. Once the notice requirement has been met,<sup>72</sup> the second possessor should be entitled to benefit from the legal fictions of civil and constructive possession. In this instance, the second possessor is entitled to benefit from the presumption that he is the owner of the land, and he should be entitled to acquire by acquisitive prescription to the extent of his title on the basis of presumed or actual acquiescence by the prior possessor to the adverse claim.

The equities of this exception are demonstrated by the following example. In figure 3,<sup>73</sup> assume X acquires title to tract 1 and enters

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69. Thus, there can never be any "constructive disseisin." 5 G. Thompson, *supra* note 50, § 2545, at 615.

70. *Gerhard v. Stephens*, 68 Cal. 2d 864, 901, 442 P.2d 692, 720, 69 Cal. Rptr. 612, 640 (1968) (citations omitted).

71. An example is provided by Texas law. A partial encroachment is notice to the true owner of the character and extent of the claim, and the true owner is charged with the fact that a deed is on record. 2 Tex. Jur. 3d Adverse Possession § 166 (1979).

72. It must be remembered that this is a question of factual sufficiency. See *supra* note 64.

73. See page 997.

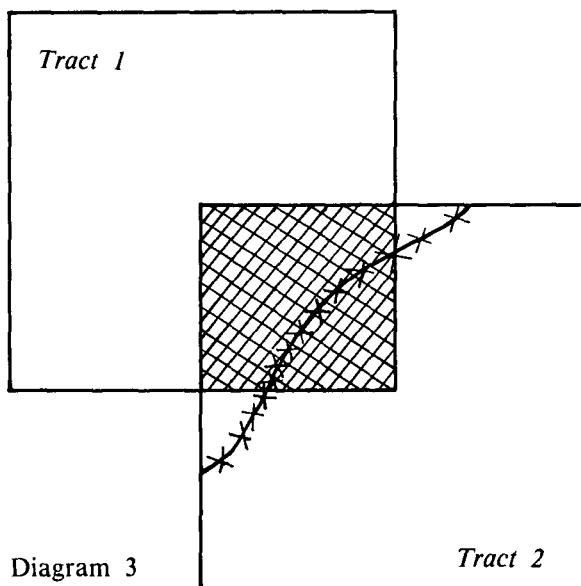


Diagram 3

into corporeal possession in the Northwest quarter. This corporeal possession of part of tract 1 gives X constructive possession of all of tract 1. Y later acquires title to tract 2 and enters into corporeal possession of the tract from the Southeast quarter up to a fence which Y builds across the Northwest quarter of tract 2, encroaching on the shaded area claimed by both parties. Under the reasoning used by the Louisiana courts,<sup>74</sup> Y would prescribe up to the fence, but his constructive possession beyond that point would not be sufficient to oust X's prior constructive possession in the shaded area. Assuming that the fence is factually sufficient to give notice to prior possessor X that Y is claiming a part of X's land,<sup>75</sup> this author believes that Y should receive the benefit of his constructive possession and, thus, oust X as to the shaded area. Conversely, if Y had not corporeally encroached upon the shaded area, X should be entitled to retain his chronologically senior possession because Y has not provided notice of his adverse claim. Thus, absent a corporeal encroachment, this comment is in accord with the existing jurisprudence in affirming that an intangible constructive or civil possession in itself cannot oust a prior possession. This analysis emphasises the notice requirement.

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74. See *supra* text accompanying notes 43-49.

75. This assumption should vary according to the circumstances of the case. For instance, an encroachment sufficient to give notice as between two residential lots may not be a sufficient encroachment as between two 1000 acre swampland tracts. See *supra* note 66.

*Conclusion*

When two constructive possessions overlap onto the same tract of land, or when a constructive possession overlaps with a civil possession, or when two civil possessions overlap, the cases should be decided according to the following framework:

1. If there is no corporeal possession by either party upon the tract in conflict, the first possessor should retain possession unless the second possessor can timely prove that he is the true owner.

Reasoning:

(a) Public policy in favor of title stability prohibits two contemporaneous possessions of the same land.

(b) A possessor is entitled to retain his land against adverse claims until he is given notice of the adverse claim.

(c) No notice is given by an adverse constructive or civil possession.

2. If one possessor has a corporeal possession which encroaches on the tract in conflict and that possession is factually sufficient to give notice, that possessor should be able to possess to the extent of his title.

Reasoning:

(a) Corporeal encroachment can give notice that there is an adverse claim to the land.

(b) A possessor who has received notice from a corporeal encroachment should be diligent in determining the extent of the challenge to his possession and presumptive ownership.

*John C. LaMaster*